Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

THE AMERICAN CIVIL LIBERTIES UNION, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.

in support of the *Petitioner*

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INTEREST OF AMICUS[1]

WallBuilders, Inc. is dedicated to educating the American Pubic about the proper exercise of rights under the First Amendment. In this capacity, WallBuilders, Inc. is gravely concerned that the unregulated distribution of material that is harmful to minors in not within the proper exercise of First Amendment rights and believes that COPA is a necessary safeguard on the vast frontier of the Internet.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit, in upholding the district court's granting of a preliminary injunction enjoining the enforcement of the Child Online Protection Act, 47 U.S.C. § 231 (Supp. 1998) (COPA), erred in determining that COPA will likely be found unconstitutional. The Third Circuit overlooked a narrowing construction to which COPA is

[1] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has mad any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

readily susceptible. COPA's key phrase, "contemporary community standards," can be construed to mean the "contemporary community standards of the community of the creator of the material." This construction is allowable under canons of construction articulated by this and other courts. When so construed, the Third Circuit's concern that web "publishers would necessarily be compelled to abide by the 'standards of the community most likely to be offended by the message,'" *Reno v. ACLU*, 217 F.3d 162, 177 (3d Cir. 2000) (citation omitted), vanishes.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN HOLDING THAT COPA IS NOT READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION

In *Reno v. ACLU*, 217 F.3d 162 (3d Cir. 2000), the Third Circuit Court of Appeals upheld the district court's granting of a preliminary injunction against the enforcement of the Child Online Protection Act, 47 U.S.C. § 231 (Supp. 1998) (hereinafter "COPA").

Crucial to the Third Circuit's holding was its determination that the ACLU would likely prevail on the merits by showing COPA's unconstitutionality. *Reno*, 217 F.3d at 166. Crucial, in turn, to this determination was the Third Circuit's conclusion that COPA's phrase "contemporary community standards" was not readily susceptible to a narrowing construction. *Id.* at 178-180. For the reasons set forth below, Amicus respectfully believes that that conclusion is incorrect and this brief will address this one issue.

The Third Circuit rejected the government's argument that COPA's phrase "contemporary community standards" could mean an "adult community" rather than a "geographic community" as it did in *Miller v. California*, 413 U.S. 15 (1973). However, in so doing, the Third Circuit concluded that web "publishers would necessarily be compelled to abide by the 'standards of the community most likely to be offended by the message.'" *Reno*, 217 F.3d at 177

(*citing Reno v. ACLU*, 521 U.S. 844, 877-78 (1997))[2]. However, the Third Circuit created a false dichotomy. Agreeing with the government's position or deciding that the contemporary community standards had to be those of the community of the recipient are not the only two choices. Under standard canons of construction for facial overbreadth challenges, there is another narrowing construction that should be adopted and which would save COPA.

II. COPA IS READILY SUSCEPTIBLE TO A NARROWING CONSTRUCTION BECAUSE THE PROPOSED CONSTRUCTION IS REASONABLE, IT IS BASED ON AN AMBIGUITY IN ONE PHRASE, AND IT DOES NOT REQUIRE THIS COURT TO DRAW ANY LINES THAT CONGRESS HAS LEFT UNDRAWN.

This Court, in *Reno II*, stated that it could construe a statute narrowly if it were readily susceptible to such a construction. 521 U.S. at 884. COPA is indeed susceptible to such a construction. This Court

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[2] The Third Circuit referred to *Reno v. ACLU*, 521 U.S. 844 as *Reno II*, to distinguish it from its own case, which it called *Reno III*. That nomenclature will be followed in this brief.

indicated that a statute would be readily susceptible to a narrowing construction when "the text or some other source of congressional intent identified a clear line that this Court could draw." *Id.* Other courts have also shed light on when a statute is or is not readily susceptible to such a construction. For example, the Tennessee Supreme Court has indicated that textual ambiguity (but not vagueness) can serve as an indication that a text is readily susceptible to a narrowing construction. *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993). This Court could adopt this approach as well. Indeed, one federal court has gone so far as to state that *any* reasonable reading should be accepted to save a statute from a facial overbreadth challenge, even if it is one of several possible conflicting readings. *Rhode Island Med. Society v. Whitehouse*, 66 F. Supp. 2d. 288 (D.R.I. 1999).

As will be discussed, under any of these approaches, COPA is susceptible to a narrowing construction since the proposed construction is reasonable, it is based on an ambiguity in one phrase,

and it does not require this Court to draw any lines that Congress has left undrawn.

A. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" is reasonable.

COPA can be narrowed by construing the phrase "contemporary community standards" to mean the standards of the community of the creator of the material COPA seeks to proscribe. There is no reason why, in rejecting the government's "adult community" argument, the language must be construed to mean the community of the recipient rather than the community of the creator. If the creator is subject only to the standards of his or her own community, the Third Circuit's concern vanishes.

This construction is a reasonable one. ~~In~~ *Rhode Island Medical Society*, the court was discussing the construction of a state, not a federal, statute. However, its comments on reasonableness were properly derived from this Court's cases dealing with both types of statutes and are germane here. The *Rhode Island*

Medical Society court, in coming to its determination that every reasonable construction must be considered, relied upon a more general statutory canon of this Court and simply applied in the context of a facial overbreadth challenge. The canon relied upon by the *Rhode Island Medical Society* court is that courts must apply *any* reasonable construction that would be constitutional. The *Rhode Island Medical Society* court, 66 F. Supp. 2d at 306, quoted this Court's opinion in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building. & Construction Trades Council*, 485 U.S. 586, 575 (1988) for this proposition: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." In turn, the *DeBartolo* Court relied upon no less than nine cases in support of this canon of construction, 485 U.S. at 575, including *Hooper v. California*, 155 U.S. 648, 657 (1895), which the *DeBartolo* Court quoted for the proposition that "the elementary rule is that every

reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

Thus, the *Rhode Island Medical Society* court's approach is consistent with this Court's own approach. In *Rhode Island Medical Society*, the court was concerned that none of the competing narrowing constructions offered in defense of Rhode Island's partial birth abortion statute were reasonable because they all involved reading complex medical procedures or distinctions into the statute. 66 F. Supp. 2d at 306-07.

In the instant case, by contrast, nothing need be read into the statute except a single prepositional phrase—"of the creator's community"—needed to clarify a single patent ambiguity. COPA's text, including the definitional sections, leaves completely unanswered the question, "From which community do the contemporary community standards derive?" It is certainly reasonable to answer that the community should be the community of the creator of the material. This completely eliminates the Third Circuit's concern that web "publishers would necessarily be compelled to

abide by the 'standards of the community most likely to be offended by the message.'" *Reno III*, 217 F.3d 162, 177 (3d Cir. 2000) (*citing Reno II*, 521 U.S. 844, 877-878 (1997)).

Neither is this approach undercut by this Court's statement in *DeBartolo* that, "the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575. This is for the simple reason that Congress' intent cannot be determined. As the Third Circuit pointed out, *Reno III*, 217 F.3d at 174-75, Congress claims, on the one hand, to have intended to incorporate the *Miller* standards—which are clearly geographically based—and, on the other hand, to have intended to reject *Miller's* geographically based standards in lieu of an "adult" standard.

In attempting this "have their cake and eat it too" approach, Congress merely ended up expressing two mutually exclusive intentions, thus leaving the real intention undiscernible. It was for this same reason that this Court refused to be bound by one of Congress' two

purported intentions when it evaluated the constitutionality of the CDA in *Reno II*.

In that case, this Court stated that "[t]he CDA, which implements the 'contemporary community standards' language of *Miller*, thus conflicts with the Conferees' own assertion that the CDA was intended 'to establish a uniform national standard of content regulation.'" *Reno II, 521 U.S.* at 874, n.39 (citation omitted).

Thus, under the *Rhode Island Medical Society/DeBartolo/Hooper v. California* approach, COPA is readily susceptible to a narrowing construction whereby "contemporary community standards" is construed to mean the standards of the community of the creator of the material.

B. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" is based upon an ambiguity in one phrase.

As is evident from the discussion above, the same line of reasoning indicates that COPA is readily susceptible to the narrowing construction under the

Tennessee Supreme Court's approach to determining ready susceptibility. In *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993), the Tennessee Supreme Court declared that an ambiguity in a key term in a statute rendered it readily susceptible to a narrowing construction. Thus, for all the reasons stated above, COPA's ambiguity regarding which community's standards are to be employed renders it readily susceptible to a saving narrowing construction.

C. Construing "contemporary community standards" to mean the "contemporary community standards of the community of the creator" does not require this Court to draw any lines that Congress left undrawn.

Finally, under the standard articulated by this Court in *Reno II*, 521 U.S. at 884, COPA is also susceptible to this narrowing construction. There this Court declared that a statute is not readily susceptible to a narrowing construction if the Court would be called upon to "'draw one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn' because doing so

'involves a far more serious invasion of the legislative domain.'" *Id.* (*quoting United States v. Treasury Employees*, 513 U.S. 454, 479, n.26 (1995)).

Here, this Court would not have to draw any lines whatsoever. As the Third Circuit noted below, when Congress enacted COPA, it was specifically attempting to fully addressed this Court's concerns about the CDA. *Reno III*, 217 F.3d at 167. As the Third Circuit admits, COPA "restrict[s] its scope to material on the Web rather than on the Internet as a whole; [ ] target[s] only those Web communications made for 'commercial purposes'; and [ ] limit[s] its scope to only that material deemed 'harmful to minors'." *Id.* (footnotes omitted). Thus, the lines have all been drawn. Line drawing was never the Third Circuit's concern in this case. Rather, that court was simply concerned that the narrowing construction offered by the government was not convincing.

Thus, in sum, COPA is readily susceptible to a narrowing construction because the construction suggested is a reasonable construction and all reasonable

constructions must be adopted; because the ambiguity of a key term is an indication that the statute is readily susceptible to a narrowing construction; and because this Court is not called upon to draw any lines that Congress failed to draw.

III. STATUTORY AND CASE LAW SUPPORT EXISTS FOR CONSTRUING "CONTEMPORARY COMMUNITY STANDARDS" TO MEAN THE "CONTEMPORARY COMMUNITY STANDARDS OF THE COMMUNITY OF THE CREATOR" AND NO GOOD REASON TO REJECT THE CONSTRUCTION.

Under both 47 U.S.C. § 505 (1994) and 18 U.S.C. § 3227 (1994), venue will lie in the community of creation and not merely in the community of receipt. Furthermore, courts have explicitly held that in applying *Miller's* "contemporary community standards," those standards can be those of the community of creation. *See, e.g., United States v. Cohen,* 583 F.2d 1030, 1040-41 (8th Cir. 1978) (mailed obscenity); and *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996) (electronic bulletin board obscenity). Interestingly, the Third

Circuit discussed the *Thomas* case and even discussed some aspects of its treatment of the two communities, at *Reno III*, 217 F.3d at 176yet failed to consider *Thomas'* insights as a basis for a narrowing construction.

It is worth mentioning that this Court's hypothetical in *Reno II* in no way renders the proposed narrowing construction problematic. In *Reno II*, 521 U.S. at 878, this Court wrote, "Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material 'indecent' or 'patently offensive,' if the college town's community thought otherwise." This hypothetical does not stand as a barrier to this Court adopting the narrowing construction of "contemporary community standards" suggested here for two possible reasons.

First, it is possible when the hypothetical was written, this Court had simply not considered the construction suggested by this brief. Thus, the hypothetical may not represent a rejection of this

construction at all. Rather, the construction may simply never have been considered. This Court may surely entertain this construction now. Indeed, this Court has previously indicated that it has a duty to do so. As quoted above, this Court has stated that "every reasonable construction *must* be resorted to . . . ." *Hooper v. California*, 155 U.S. 648, 657 (1895) (emphasis added).

Second, in *Reno II*, this Court was trying to reconcile Congress' supposed intention of "establish[ing] a uniform national standard of content regulation." 521 U.S. at 874, n.39 (quoting S. Conf. Rep., at 191), with its inartful importation of only one of *Miller's* three prongs. In COPA, however, Congress sought to overcome all of this Court's objections to the CDA. *Reno III*, 217 F.3d at 174. Not withstanding Congress' ongoing difficulty with conflicting intentions (*see supra*), the particular conflicting intentions discussed in *Reno II* along with the incomplete utilization of the *Miller* prongs have been rectified in COPA. While the matter is still less than clear, there is

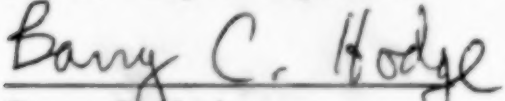
much less reason under COPA than there was under CDA to believe that Congress is trying to impose a "uniform national standard." Under these circumstances, there is no reason why the proposed construction could not be employed to avoid exactly the result that the *Reno II* hypothetical was concerned about, *i.e.*, the community standard of the recipient community need not subject the parent to liability if the home community standard would not.

Lastly, one should note that the government's failure to raise this argument is no impediment to this Court entertaining the argument. First, as noted above, this Court has previously declared that "*every* reasonable construction must be resorted to . . . ." *Hooper v. California*, 155 U.S. 648, 657 (1895) (emphasis added). "Every" is not limited to those that are raised by a party. Second, this Court has explicitly stated that it will, in its discretion, entertain issues and arguments raised only in amicus briefs. *Davis v. United States,* 512 U.S. 452, 457, n.* (1994); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion).

CONCLUSION

For the foregoing reasons, the Third Circuit's conclusion that the ACLU would likely succeed on the merits is erroneous and, thus, it should not have affirmed the district court's order issuing a preliminary injunction. Therefore, this Court should reverse the decision of the Third Circuit.

Respectfully submitted
this 27th day of July, 2001.



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